

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 LARRY DONACHY, et al., :
4 Plaintiff :
5 v. : C.A. No. 04-245 Erie
6 MOTION CONTROL INDUSTRIES, :
7 et al., : Defendant :
8

9 Oral Argument Hearing in the above-captioned
10 matter held on Wednesday, December 14, 2005,
11 commencing at 1:24 p.m., before the Honorable
12 Sean J. McLaughlin, Courtroom C, at the United States
13 Courthouse, Erie, Pennsylvania 16501.
14
15

16 For the Plaintiffs:
17 Jason Mettley, Esquire
18 Robert A. Eberly, Esquire
19 Jubelirer Pass & Intrieri, PC
20 219 Fort Pitt Boulevard
21 Pittsburgh, PA 15222-1576

22 For the Defendants:
23 Richard A. Lanzillo, Esquire
24 Knox McLaughlin Gornall & Sennett, PC
25 120 West 10th Street
 Erie, PA 16501

 Reported by Janis L. Ferguson, RPR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

TRANSCRIPTS OF PROCEEDINGS 3

1 THE COURT: We have for consideration today
2 cross-motions for summary judgment at 04-245. I have had
3 the opportunity to read the briefs and reply brief and get
4 through the record, such as it is. I think the Defendant
5 filed its motion first. Mr. Lanzillo?

6 MR. LANZILLO: Thank you, Judge. Your Honor, as
7 the Court has no doubt discerned, reviewing the papers,
8 there are really two threshold issues.

9 THE COURT: Well, let me start with one, which you
10 may be about to mention. And that's the question of
11 exhaustion. And I want to see if I can figure out what's
12 going on here, because it looks for all the world like both
13 sides of the ships passing in the night. Maybe. I don't
14 know. But this is why this argument is going to be
15 particularly helpful. Should be particularly helpful.

16 Let me see if I understand your position.
17 Your position now is that the original claim that the
18 Plaintiffs made and the claim as sketched in the Complaint
19 is a claim that they should be entitled to normal retirement
20 benefits upon the attainment of age 65, such that it would
21 carry with it a multiplier of \$31. Is that correct?

22 MR. LANZILLO: That's correct, Your Honor.

23 THE COURT: You don't have to tell me more right
24 now. That's number one. And in response to Plaintiffs'
25 contention, the Plaintiffs come on and file their brief.

1 And among the things that they asked me -- this is a lump
2 question. But be that as it may. One of the things
3 Mr. Eberle asked me to do is to essentially apply the de
4 novo standard of review on the basis that the reason or
5 reasons that you articulated in your brief were never
6 articulated by the plan or the plan administrator or much
7 less Richard Perhacs. I agree with that, by the way, as a
8 side issue. At least it appears to me.

9 You then come back -- I'm showing you how
10 twisted this knot has become. You then come back and say to
11 me, well, that's preposterous, because how can we be accused
12 of coming up with a position for the first time when it's he
13 who is coming -- the Plaintiffs are coming up with the
14 position for the first time.

15 Is that accurate so far, in broad brush?

16 MR. LANZILLO: In broad brush, Your Honor.

17 THE COURT: All right. I'm not going to hold you
18 to that. Now, let me go back and ask some specific
19 questions.

20 I, in response to the Plaintiffs' claim for
21 normal -- excuse me. What do they call it?

22 MR. LANZILLO: Normal retirement benefits.

23 THE COURT: Normal retirement benefits. The only
24 thing I could -- well, let me ask you. There was no formal
25 action on this by the Plaintiff with respect to the original

1 request, was there?

2 MR. LANZILLO: There could -- no. And there could
3 not have been, because this was presented not by Mr. Kinley,
4 not by Mr. Donachy. This was presented by a Union as part
5 of a grievance, Your Honor. You commented about Mr.
6 Perhacs' rationale, which was in a totally different
7 context, representing only Motion Control in the context of
8 a grievance. The difference here is, Your Honor, is the
9 plan is now a party to the litigation. Motion Control is
10 not synonymous with -- is not synonymous with the plan --

11 THE COURT: But Mr. Eberle, if memory serves,
12 wrote to Attorney Perhacs on behalf of -- was it on behalf
13 of Donachy and the other Plaintiffs? I mean, look at the
14 letter.

15 MR. LANZILLO: I have, Your Honor. And I don't
16 think that it was on behalf of Mr. Donachy. I would have to
17 look at the letter again.

18 THE COURT: Well, let's look at it.

19 MR. LANZILLO: But, Your Honor, my problem with
20 that, and why that cannot or should not impact or excuse the
21 failure to exhaust administrative remedies, is that that was
22 in the context of a grievance matter --

23 THE COURT: Well, it may have been, but he then
24 goes on in the same letter, meaning Eberle, and says that
25 given the nature of the issue and general right of

1 individuals to seek a declaration of ERISA, it would be more
2 straightforward to proceed with a civil action and get a
3 binding determination as to those rights, et cetera.

4 And then, without reading the letter, Perhaps
5 comes back and says, in essence, this matter has already
6 been resolved by virtue of the settlement of the collective
7 bargaining grievance at 004(a), and the issue of the proper
8 multiplier is governed by the collective bargaining
9 agreement and not by the plan document itself or any
10 provision of ERISA. Isn't the -- that's wrong. That is an
11 incorrect statement, isn't it? I mean, if you want to
12 really parse it.

13 MR. LANZILLO: The way I interpreted that
14 statement --

15 THE COURT: And let me tell you why, and then you
16 can tell me. The terms and conditions of the collective
17 bargaining agreement, insofar as they relate to multiplier,
18 become part of a plan, don't they? Are incorporated into
19 the plan?

20 MR. LANZILLO: Yes.

21 THE COURT: Now, tell me why -- and I'm not saying
22 that Mr. Perhaps, being what I think is perhaps inaccurate
23 here, is necessarily material one way or the other. But if
24 he's not -- if he is not inaccurate, why is he not
25 inaccurate?

1 MR. LANZILLO: Well, as I interpreted that letter,
2 Your Honor, he was speaking in terms of the termination of
3 the \$31 multiplier. That is uniquely something determined
4 through the collective bargaining process.

5 However, in -- in determining how that
6 multiplier is going to be applied in a given situation to a
7 given participant, that is, as a matter of law, a matter of
8 plan interpretation.

9 THE COURT: No question about it. He's wrong. I
10 mean, you have to go to the plan, don't you? Where else
11 would you go?

12 MR. LANZILLO: In order to resolve the issues
13 presented here, we have to go to the plan.

14 THE COURT: All right. Then my next question is,
15 then back comes Mr. Eberle on May 24th and says, in part --
16 he's asking for a clarification of the position. He says,
17 "Regarding the exhaustion of administrative remedies, please
18 consider this letter to be a request by Messrs. Donachy and
19 Kinley for a determination of the proper multiplier to be
20 used in calculation of benefits." And then he goes on. "If
21 the pension plan requires these individuals to submit
22 applications directly, rather than through legal counsel,
23 please advise me so that I can instruct them to proceed."

24 Do you interpret that as a request to
25 jump-start the exhaustion process?

1 MR. LANZILLO: I do not. It cannot be. The plan
2 was not represented by Richard Perhacs. He was not involved
3 in anything through that date. I don't know whether Mr.
4 Perhacs responded to that or not. But at that point, all --

5 THE COURT: Are you saying Perhacs was just
6 representing Motion Control?

7 MR. LANZILLO: That's correct.

8 THE COURT: Why did he -- I mean, it's neither
9 here nor there. Are you saying this information should
10 have, but never got on the plan?

11 MR. LANZILLO: I don't know, Your Honor. In the
12 context they were working with, it was part of a grievance.
13 We all kind of run home to what we know. And what --

14 THE COURT: Well, Perhacs apparently ran home to
15 what he knew -- and this is not being critical at all. I'm
16 trying to understand why this thing stalled in space. He
17 apparently was of the opinion, albeit mistaken, that this
18 was a matter exclusively for the collective bargaining
19 agreement. Is that right?

20 MR. LANZILLO: To the extent that the issues are
21 controlled here today by the collective bargaining
22 agreement, that's right.

23 THE COURT: All right. Now, getting back to the
24 exhaustion issue again, what -- and this is why this gets a
25 little unusual, because I'm going to be asking Mr. Eberle in

1 a minute. It appears to me that the normal retirement
2 benefit claim has been implicitly withdrawn.

3 MR. LANZILLO: I think it has.

4 THE COURT: But whatever the merits of that are,
5 what more should he have done -- what was required of him to
6 exhaust?

7 MR. LANZILLO: The plan is quite specific. They
8 need to provide the data and the support for whatever
9 benefit they are claiming. And the only benefit that has
10 ever been presented truly of record, up until the filing of
11 cross-motion for summary judgment, was a claim for normal
12 retirement benefits, which clearly on the face of the plan
13 is invalid. If your vesting service terminates before
14 normal retirement age, which is defined as age 65, you can't
15 get those benefits.

16 THE COURT: So you're saying that the original
17 claim was for that. The new claim is an entitlement based
18 on deferred vested benefits.

19 MR. LANZILLO: Which sends you into a completely
20 different analysis in terms of calculating the amount of the
21 benefit. And, Your Honor, if you look at the original claim
22 for normal retirement benefits, you would have no doubt
23 noted that the claim was that when we reach regular
24 retirement age -- normal retirement age is age 65 --
25 whatever rate is in effect at that time controls. Which is

1 likely to be the \$31 rate, because there's not going to be
2 any further collective bargaining agreements.

3 If you switch ahead now and change -- switch
4 gears to deferred vested retirement, there are all sorts of
5 eligibility issues which are unclear on this record --

6 THE COURT: Well, I know. One of them, you say,
7 is age. To me, that's easily cured.

8 MR. LANZILLO: It's so much more than that, Judge.

9 THE COURT: I realize that. You know, here is
10 my -- I'm going to hear from Mr. Eberle next, and then I'm
11 going to let you come back up.

12 But insofar -- essentially, as I understand
13 the Plaintiffs' argument -- he's saying that we acquired
14 sufficient vested service under a number of different -- any
15 number of different theories, including you get one hour
16 vested service for each hour of involuntary layoff. You
17 have -- we could have accrued it through the Warn Act. And
18 I think the other one was vacation pay.

19 My question to you is this: It's your
20 position that those issues had never been addressed before.
21 Is that correct?

22 MR. LANZILLO: That's part of it, yes.

23 THE COURT: And it's also your position that those
24 are precisely the type of issues that require precisely the
25 type of plan interpretation that exhaustion is meant to

1 enhance. Is that correct?

2 MR. LANZILLO: Yes.

3 THE COURT: As counsel for the plan, would it
4 be -- based upon your response to -- substantive response to
5 those positions, would it be futile --

6 MR. LANZILLO: No.

7 THE COURT: -- for the Plaintiff to try to exhaust
8 now?

9 MR. LANZILLO: It would not, Your Honor.

10 THE COURT: Why not?

11 MR. LANZILLO: It is -- on this record, I believe
12 you can, as a matter of law, conclude that the Plaintiffs
13 are not entitled to the \$31 multiplier --

14 THE COURT: How can I -- it's a jurisdictional
15 deficit, isn't it? Then I would be doing precisely what
16 you're telling me I can't do.

17 MR. LANZILLO: And I understand you see an
18 inconsistency there, and I anticipated that. That argument
19 is --

20 THE COURT: Either you're in for a penny or you're
21 in for a pound. Either I can or I can't.

22 MR. LANZILLO: One thing that I don't believe can
23 happen here -- there are matters that are acutely within the
24 province of the committee. And let me go back for a moment.
25 I believe that the Plaintiff's position is incorrect

1 concerning how they are interpreting the terms credit and
2 service, vested service, years of service. They are
3 trying --

4 THE COURT: Well, you're not the plan
5 administrator.

6 MR. LANZILLO: I am not. That's correct, Your
7 Honor. And I understand that the -- I think the most
8 appropriate treatment here would be dismissal without
9 prejudice to allow for exhaustion. However, if the Court
10 were to take up that issue, I certainly don't want to forego
11 my opportunity to argue the way I see it. But you're
12 correct. I am here as counsel. I am not the committee --
13 quite frankly, the committee is comprised of individuals who
14 meet on a regular basis, but who I haven't been -- they
15 don't -- like any other body, they cannot act individually.
16 They have to act collectively.

17 THE COURT: All right. Let me hear what
18 Mr. Eberle has to say.

19 MR. EBERLE: Your Honor, I defer to more expert
20 knowledge; Jason Mettley from my office.

21 THE COURT: All right, Mr. Mettley.

22 MR. METTLEY: Good afternoon, Your Honor.

23 THE COURT: Hello. Do you concede, for purposes
24 of our discussion here this afternoon, that at no time did
25 the Plaintiffs request -- at no time until the brief was

1 filed, at no time did they request or demand entitlement to
2 the \$31 multiplier based upon the two-fold contention that
3 they were entitled to it under the deferred vested
4 retirement benefits, and, further, that they had acquired
5 sufficient service to get them into the year 2000 through
6 one of those three ways I have just indicated?

7 MR. METTLEY: No, Your Honor, the Plaintiffs never
8 articulated that theory until summary judgment.

9 THE COURT: All right. Now, would it also be fair
10 to say -- and there's nothing wrong with this, because a
11 ship sets sail on one legal tack and often comes to a new
12 tack, as the master determines that one may be more
13 advantageous than another.

14 It's true, isn't it, that the original
15 proposition that was put forward back then, when the demands
16 were made -- and also in the Complaint at Paragraphs 9 and
17 10 is a claim for normal retirement benefits upon the
18 attainment of age 65?

19 MR. METTLEY: I think those paragraphs in the
20 Complaint, Your Honor, reference the fact that when they get
21 to age 65, they would be eligible for normal retirement. I
22 would actually ask Your Honor that the Court focus its
23 attention on Paragraph 22 of the Complaint, which I think --

24 THE COURT: Slowly, though, if you want to read
25 it.

1 MR. METTLEY: Sure. I'll read the whole --

2 THE COURT: Well, actually, let me do you a favor.
3 Let me look at it.

4 MR. METTLEY: Here, I found my spot, Your Honor.
5 "Donachy and Kinley believe and, therefore, aver that the
6 retirement plan --"

7 (Mr. Mettley interrupted by the reporter.)

8 MR. METTLEY: "-- must calculate their retirement
9 benefits." Not normal retirement benefits. It says, "Must
10 calculate their retirement benefits, as well as the benefits
11 of all other employees who apply for their pensions after
12 June 27th, 2003, based upon the final multiplier in the 2000
13 agreement," \$31 multiplier.

14 Your Honor, if I may, I would suggest to you
15 that before this claim found its way into a lawsuit, the
16 Plaintiffs asked for the plan administrator and Motion
17 Control Industries, the plan sponsor, to answer one
18 question. When we retire, are we eligible for the \$31
19 benefit. I can't tell you right now, Your Honor -- well,
20 actually, I can tell you. The Plaintiffs have never applied
21 for any type of benefit. They have not applied for normal
22 retirement benefit, they have not applied for early
23 retirement benefit, they have not applied for a deferred
24 vested retirement benefit. Those are three different kinds
25 of benefits that the plan provides. The eligibility for all

1 three different benefits are different.

2 THE COURT: But in fairness, though, clearly
3 they -- and to this day, they haven't applied for any
4 particular block. What they were really asking for from the
5 plan, if you will, was a declaration, wasn't it, as to what
6 their future rights would be?

7 MR. METTLEY: Exactly, Your Honor. And to finish
8 my thought, whether it's a normal retirement benefit, an
9 early retirement benefit, or a deferred vested retirement
10 benefit, all of those benefits are going to be calculated
11 based upon the pension multiplier. What the Plaintiffs have
12 asked for from day one, and I believe consistently all the
13 way through this, is a declaration that whatever kind of
14 benefit they are subsequently deemed eligible for, that that
15 benefit be calculated in \$31 multiplier.

16 THE COURT: Clearly, that was the promised plan
17 they were looking for; the \$31 multiplier. But the wagon
18 train, if you will, that they were riding toward that
19 promised land was the normal retirement benefits. Their
20 argument had never been couched heretofore in terms other
21 than normal retirement benefits, had it? I see nothing in
22 the record -- and this is not a criticism. But the way the
23 issue was initially joined, there was nothing -- there was
24 no claim that, based upon their years of -- based upon
25 the --

1 Let me make it more precise. I see no claim
2 ever having been made to the company that they were entitled
3 or would be entitled to a \$31 multiplier under the deferred
4 vested benefit provision of the plan. Number one. And
5 secondarily, that they would be entitled to that under one
6 of the three ways that their service would accrue, even
7 after their termination. There was no demand made on the
8 company under that scenario, was there?

9 MR. METTLEY: No. They never articulated that
10 argument.

11 THE COURT: All right. Let me ask -- and now
12 we're getting down to basics of this thing. I, as I look at
13 the record, I have no -- like I had in a hundred percent of
14 my other ERISA cases presently pending and/or decided in the
15 past, I have no decision, written decision from the plan
16 administrator addressing, if you will, point for point the
17 Plaintiffs' or the Claimants' contentions as to their
18 entitlement to a certain type of benefit. Which is another
19 way of saying, I have no plan decision against which I
20 should apply whatever standard of review. Which is another
21 way of me asking you this:

22 Why, for goodness sakes, given the history of
23 this thing as we have presently talked about it, isn't this
24 the classic case for me to send this back to the Plaintiff
25 with some, perhaps, short time frame and direction within

1 which to address the issue, as it's presently teed up, in
2 all its complexity, with two possibilities? Either the plan
3 then is going to award prospectively the \$31 multiplier or
4 they will not. But if they don't, the case comes back to
5 me, and then I can pass on it. How can I do anything other
6 than that?

7 MR. METTLEY: Well, because at this point, Your
8 Honor, I think it's futile.

9 THE COURT: Why?

10 MR. METTLEY: I don't know how, given the record
11 that's in front of you, it can be fairly said that Motion
12 Control of the plan had not had an adequate opportunity up
13 until November of this year, when we finally the first time
14 heard it, to answer our question with some explanation,
15 which is what a plan administrator, by the way, under the
16 regulations, the Department of Labor regulations, requires
17 them to do with a claim. Like you said, all the other
18 pension claims -- certainly this thing, up until the point
19 it's gotten here, it came to you in a very sideways form.

20 THE COURT: Not only sideways, but it came through
21 ducking and weaving in such a fashion that it appears to me
22 that everybody that got close to it, got confused as to what
23 the issue was.

24 Wouldn't this have been a cleaner claim and
25 more appropriately teed up from a procedural standpoint, as

1 we stand in the courtroom today -- as you stand and I sit --
2 if the original letters that went out had said, look it, we
3 understand we're not normal retirees, and we will never and
4 can never be under the clear terms of the plan, but we are
5 deferred vested benefit retirees, and this is why our
6 service throws us into that \$31 multiplier? Wouldn't that
7 be cleaner, if that's what happened?

8 MR. METTLEY: Your Honor, I want to answer your
9 question, because I don't want to be evasive. But the way
10 that you asked the question of me implies that you have an
11 understanding that I don't think is consistent with our
12 position.

13 THE COURT: That's all right.

14 MR. METTLEY: We have never applied for a normal
15 retirement benefit or any other kind of benefit. You know
16 why? Because these individuals have to get to the point in
17 life where they decide, you know what, I now need these
18 retirement benefits. It may be when they reach age 65.
19 And, Your Honor, if they do reach age 65 at that point in
20 time they are going to be eligible for normal retirement
21 benefits. Or perhaps Mr. Donachy --

22 THE COURT: That's not true. Now, with all
23 respect, do you have the Defendant's brief with you? The
24 original brief?

25 MR. METTLEY: The original one?

1 THE COURT: 11/04.

2 MR. METTLEY: Yes, I do, Your Honor.

3 THE COURT: Turn to Page 5. Now, halfway down --
4 I'm reading from the brief. "Thus, the foregoing provisions
5 establish the following eligibility rules under the plan."
6 I'm going to read these three, and you tell me which, if any
7 of them -- with which any of them you disagree.

8 One, "A participant is entitled to receive
9 normal retirement benefits only if his vesting service
10 terminates on or after the date he reaches normal retirement
11 age, 65." Do you agree with that?

12 MR. METTLEY: I do.

13 THE COURT: Plaintiffs can never -- right there,
14 they can never satisfy that prong, could they?

15 MR. METTLEY: Sure they could. When they turn age
16 65, later on down the line. At some point, unless they die,
17 they are going to turn age 65. And at that point, Your
18 Honor, they would be eligible to apply for benefits.

19 Pretend for a minute that Mr. Donachy is 22
20 years of age, when he's got -- the records -- he's actually
21 vested in the plan. As a practical matter, he's not going
22 to apply for retirement benefits right now.

23 THE COURT: But doesn't that presume that your
24 vesting service, however that term is interpreted, means
25 that for all practical purposes, you are working at the time

1 you turn 65?

2 MR. METTLEY: I don't think so. Well, for the
3 normal retirement benefit? Yes, I agree with that. It does
4 presume that.

5 THE COURT: That's what I'm talking about. The
6 normal retirement benefit. You would agree that they are --
7 they would never be eligible for a normal retirement benefit
8 under the plan, under the clear language of the plan. How
9 could it be otherwise?

10 MR. METTLEY: Your Honor, the way I would read the
11 plan is that if somebody has a vested benefit, they reach
12 age 65, at that point their vesting service has terminated,
13 they would be eligible for a normal retirement benefit. I
14 believe that to fairly go through all of the plan, what
15 you'll realize is there's two things you need to satisfy to
16 get that benefit; the age requirement, 65 years of age, and
17 the number of years of vesting service as well.

18 THE COURT: Well, there's no trick to this
19 question, but I want to make sure we're on the same page.
20 The second part, "A participant whose vesting service
21 terminates before he reaches normal retirement age is not
22 entitled to receive normal retirement benefits, but may be
23 entitled to deferred vested retirement benefits, provided he
24 satisfies the vesting requirements of the plan." Is that an
25 accurate statement?

1 MR. METTLEY: Yes, that is.

2 THE COURT: All right. Well, then, per force,
3 neither of your Plaintiffs, under -- no matter how you turn
4 this Rubic's Cube, could ever be eligible for anything other
5 than deferred vested benefits. Correct?

6 MR. METTLEY: That may be correct, Your Honor, but
7 if I can --

8 THE COURT: It either is or it isn't. How could
9 it possibly not be correct? I've got to figure out at least
10 where we know we stand, as opposed to where we might stand.

11 Do you concede that you win or lose on the
12 battlefield, that they are deferred vested benefit
13 beneficiaries whose service time has accrued sufficiently to
14 take them at least to the end of the year 2000? Isn't that
15 where you win or lose this case?

16 MR. METTLEY: To the end of 2002.

17 THE COURT: 2002. I misspoke. Isn't that true?

18 MR. METTLEY: I think that's essentially the case.
19 And perhaps, Your Honor, the reason why I don't view this as
20 the distinction between normal retirement and deferred
21 vested as being a particularly large issue --

22 THE COURT: Right.

23 MR. METTLEY: -- is because they haven't applied
24 for a benefit yet, and the plan administrator has not said,
25 yes, you're not eligible for one and you're not eligible for

1 the other one. From my standpoint, if you look at the plan,
2 if they do wait until age 65 and they file at that point in
3 time, perhaps because their vesting service did terminate
4 before 65, what they get isn't a normal retirement benefit,
5 it's a deferred vested retirement benefit. But under the
6 plan, the amount of the benefit is going to be the same, and
7 it's going to be based upon the --

8 (Mr. Mettley interrupted by the reporter.)

9 THE COURT: Too fast.

10 MR. METTLEY: I'm going a little bit too fast for
11 you.

12 And I think what our clients have really been
13 looking for, for a long time, is what is the multiplier
14 going to be when we get there.

15 THE COURT: Well, I think that that is a critical
16 question. But let me just -- do both of your clients
17 qualify for deferred vested benefits?

18 MR. METTLEY: Yes.

19 THE COURT: How old are they?

20 MR. METTLEY: I don't know their ages off the top
21 of my head, Your Honor.

22 MR. EBERLE: Your Honor, Mr. Donachy turns 65 in,
23 I believe, 2017. Mr. Kinley is right around the same age.

24 THE COURT: I think I know the answer to this
25 question, but it just occurred to me. Is this ripe?

1 MR. METTLEY: Absolutely.

2 THE COURT: Why?

3 MR. METTLEY: Because they have asked the plan
4 sponsor specifically -- and I think fairly that information
5 should have made its way to the plan administrator, because
6 it was clearly -- the questions clearly articulate to the
7 plan's sponsor, Motion Control, are we entitled to the \$31
8 benefit, and --

9 THE COURT: You misunderstood my question. It was
10 a bad one. By all events, neither Plaintiff would be
11 entitled to a \$31 multiplier until attaining age 65. Is
12 that correct?

13 MR. METTLEY: No, I don't think that is correct.

14 THE COURT: When would they be entitled to it?

15 MR. METTLEY: The plan says that --

16 THE COURT: As a deferred vested benefit
17 beneficiary, when would they be entitled to it?

18 MR. METTLEY: Whenever they apply. If they apply
19 and they satisfy the criterion -- which I think the deferred
20 vested is only going to have five years of vesting service,
21 which they already have. They could apply tomorrow, they
22 could apply five years from now --

23 THE COURT: All right. Now, getting back to my
24 original point, it's accurate to say that they asked for a
25 declaration from the plan, if you will, that they would be

1 entitled to a \$31 multiplier upon the -- originally asked,
2 for a declaration that they would be entitled to a \$31
3 multiplier upon the attainment of age 65. Isn't that right?

4 MR. METTLEY: I don't agree with that. I think
5 that --

6 THE COURT: Why is it in your Complaint, then, at
7 paragraphs nine and 10. See, part of the problem here is
8 this record is so barn sketchy as to what happened way back
9 when. It does say that, does it not?

10 MR. METTLEY: It said when they reach 65 years of
11 age they will be eligible for a normal retirement benefit.
12 If I may, Your Honor, I think the legal claim is found under
13 count one. This is a one count lawsuit. Paragraph 22 in
14 count one, what they are asking for, what they are
15 requesting is a declaration that individuals that retire on
16 or after June 27, 2003 --

17 THE COURT: Slow.

18 MR. METTLEY: Are entitled to a retirement
19 benefit -- doesn't specify which kind, based on the \$31
20 multiplier. And that's what my partner Eberle wrote. That
21 is the same position he's posed in 22 letters he sent to
22 Motion Control.

23 THE COURT: Isn't it true, though, that I find
24 myself in the difficult position of being asked to interpret
25 a plan in a rather -- with some rather sophisticated

1 arguments being made as to how one grows his or her years of
2 service under those three rationale, without the benefit
3 whatsoever of the plan itself and those people who are
4 supposed to be experts having had the opportunity to pass on
5 it in the first instance.

6 MR. METTLEY: That is true.

7 THE COURT: That's where I am.

8 MR. METTLEY: That's where the Court is, Your
9 Honor.

10 THE COURT: Now, unless -- and in the absence of
11 any earlier plan determination -- and it does seem to me, I
12 have to tell you, that Mr. Perhacs' letter was not addressed
13 toward the plan, it was addressed toward the collective
14 bargaining issues. But be that as it may, in the absence of
15 any earlier determination from the plan from which I could
16 glean some type of fixed opinion, such that any further
17 effort on your part would be futile, why aren't I required
18 under Third Circuit law here to send you back to the plan
19 under a relatively short time period, three weeks, four
20 weeks, to get a formal determination, and then if you don't
21 like it, come back and have it out here with me? Isn't that
22 the appropriate way to do this?

23 MR. METTLEY: I think that opportunity has already
24 been afforded, Your Honor, and I think our clients, after
25 all this time, are entitled to have that answered. So --

1 THE COURT: Is that because -- and I fault you not
2 in the least for that. But is that because by all events,
3 you would prefer a de novo review by me, as opposed to an
4 arbitrary and capricious review by me?

5 MR. METTLEY: Well, to be perfectly honest, I
6 think the plan language that's involved here is so
7 straightforward, I'm not sure that it's going to benefit the
8 Defendants to have the higher standard of review. So I
9 don't think this is -- I'm not pitching this argument to
10 you, Your Honor, from a strategical standpoint. Certainly
11 in these kinds of cases you do argue over the standard of
12 review.

13 Genuinely, you know, the last letter in the
14 chain was from Mr. Eberle, again establishing, if we retire
15 after that date in 2003, do we get the \$31 multiplier.
16 There was not a response to that letter. That letter was
17 May 24th, 2004. The Circuit clearly says that if it becomes
18 futile at a point, then we can come into Federal Court and
19 petition to have these rights clarified.

20 I agree that it's unfair to Your Honor; that
21 you don't have the opportunity to see some decision-making
22 before it got to you, but I think it's properly here, and it
23 should be decided.

24 THE COURT: I'm going to now move off the
25 procedure, and I am going to spend a little bit of time on

1 substance, but I'm going to pick that up with Mr. Lanzillo,
2 then I'll let you -- we are now going to be talking about
3 your theory as to entitlement under deferred vested
4 benefits.

5 MR. METTLEY: Thank you, Your Honor.

6 THE COURT: All right. Mr. Eberle, I have never
7 seen you so quiet in all the times you have been up here.

8 MR. EBERLE: This is tough, Your Honor.

9 MR. LANZILLO: Your Honor, just a couple points of
10 clarification. Whether you're asking for deferred vested
11 retirement benefits, normal retirement benefits, disability
12 retirement benefits, early retirement benefits, it's
13 critically important to how you calculate the benefit and
14 whether the \$31 multiplier applies. That's why exhaustion
15 is so important here.

16 The way the question has been phrased here
17 today is that we should have discerned a general request to
18 let us know -- you know, Motion Control, get in touch with
19 the plan and tell us where we stand. You know, what are our
20 rights under the plan. In order --

21 THE COURT: So you're saying that the request
22 wasn't sufficiently and narrowly crafted. Is that what
23 you're saying?

24 MR. LANZILLO: It was not. The possibilities --
25 it would be unfair to say --

1 THE COURT: Well, I can see the possibilities are
2 endless, because I have the arguments now that are put out
3 before me.

4 MR. LANZILLO: That's correct, Your Honor. And
5 they go in so many different directions here. I mean,
6 whether they are asking for normal retirement benefits --
7 and it's not just deferred vested retirement benefits. No
8 one has talked about them, so I didn't want to complicate
9 things further. But someone could hypothetically say I'm
10 entitled to early retirement benefits. Well, disability
11 retirement benefits is a bit too hypothetical.

12 But the analysis goes off in different
13 directions, depending on what you're asking for. And that's
14 the first question. The next issue is timing; when are you
15 submitting your claim. Depending on -- and how is it -- you
16 know, where does it fit relative to your age. Depending on
17 how -- which question is being posed will direct you to the
18 proper analysis or the benefit multiplier.

19 Let me just give one example. Paragraph L
20 from the supplement makes a very, very prominent distinction
21 between how you handle increases in the benefit multiplier,
22 depending on whether you're asking for normal retirement
23 benefits versus deferred vested retirement benefits. That's
24 just one of the plan interpretation issues.

25 Then, of course, you have all of the factual

1 issues, as far as hours of service credit. Some things are
2 added, some things are deducted. It depends on whether
3 you're looking at it from the perspective of credited
4 service, versus vested retirement service.

5 I'll tell you, the first time I read this
6 plan, first I thought I needed to go get a CAT scan, because
7 it caused brain damage. Then I thought it was just poor
8 drafting; that this was a piece of garbage put together.
9 But the third and fourth time I read it, it struck me as
10 almost a work of brilliance. I mean --

11 THE COURT: Brilliant obfuscation or real
12 brilliance?

13 MR. LANZILLO: Real brilliance. I mean, this
14 thing -- now, only after reading it 15 times, am I starting
15 to appreciate the structure of this.

16 THE COURT: All right. Well, you know, you can
17 pay homage to -- I'm not sure where that gets us. I mean,
18 let's assume -- well, I'll tell you where it gets us. Let's
19 go here: This is the \$64,000 question, I think. And
20 perhaps Mr. Mettley would agree with me or not.

21 But as this thing now is teed up, the
22 critical question is when does an employee's vesting service
23 terminate, it seems to me. And the corollary of that is,
24 can you continue to accrue vesting service when you're no
25 longer there, when the plant has closed down.

1 Now, with those questions, tell me why the
2 Plaintiffs' theory, that notwithstanding the -- what they --
3 well, first of all, was this an involuntary layoff?

4 MR. LANZILLO: It was a termination. It was a
5 permanent layoff. Not the type of layoff where it's
6 contemplated for recall, which is treated differently.

7 THE COURT: All right. A permanent layoff because
8 there's nothing to go back to.

9 MR. LANZILLO: Yes. The plant is gone. The plant
10 has been shut down.

11 THE COURT: That having been said, why -- and in
12 getting to the merits here, I am in no way
13 suggesting that -- I think I have got jurisdiction of this
14 thing, but as long as you folks are here, I might as well
15 hear what you have to say. Why are the Plaintiffs wrong
16 that in one form or fashion they didn't accrue sufficient
17 hours of vesting service to take them to at least the end of
18 2002, at which point, by their argument, this \$31 multiplier
19 would kick in?

20 MR. LANZILLO: You're mixing two related, but
21 distinct questions to get to the wrong answer. When you
22 talk about when vesting service terminates, you look at --
23 the latest that someone's vesting service in this particular
24 case could terminate was at the end of the Warn Act hours.
25 It probably terminated as of January 11, 2002, but for

1 argument purposes let me say that -- let me concede, for
2 argument only, that it terminated in March of 2002. You
3 look -- that is it. That's when their vesting service is
4 fixed. They may get additional hours added on, which will
5 allow them to get one more year of vesting service to get to
6 the five necessary to vest some form of benefit, depending
7 on what they are asking for. Different question than when
8 vesting service terminates.

9 And their service -- their vesting service
10 terminated as of March of 2002. It's at that point when you
11 tally up all the hours and see whether they have --

12 THE COURT: For the record, that's when the plant
13 closed?

14 MR. LANZILLO: The plant shut down operations
15 January 11. Kept a skeleton crew on to shut things down.
16 It paid its employees through -- I believe it was March 16,
17 2002. Now, distinguish that --

18 THE COURT: Is vested service defined under the
19 plan?

20 MR. LANZILLO: Section 3.5.

21 THE COURT: How does it define that?

22 MR. LANZILLO: I am not that good. It's a fairly
23 long --

24 THE COURT: All right. Well, maybe you can tell
25 me, in essence, what it says. Does the plan address the

1 question as to how one accrues vesting service?

2 MR. LANZILLO: It does, Your Honor. But here is
3 the critical thing about vesting service: Vesting
4 service -- and this is right in the first -- I can tell you,
5 this is in the first line or two of the definition. And
6 it's not a simple definition. It deals with multiple
7 situations.

8 But the critical language is this: Vesting
9 service is used to determine eligibility. That's the key
10 term. If you want to determine benefit, you have to look at
11 credited service.

12 The plan fixes the multiplier as of the date
13 vesting service terminates, which, in this case, was no
14 later than March of 2002. That tells you -- that's when you
15 measure the hours of service and crediting service. Then
16 you have to go to crediting service, which the definition of
17 crediting service is Section 3.6 -- it's 3.5 for vesting
18 service, 3.6 for crediting service. That tells you how to
19 calculate the amount of the benefit, and it gives you all
20 sorts of additions and deductions to hours, but they are
21 really two different questions.

22 What the Plaintiffs have done wrong is they
23 have tried to mix them together to say that -- here is their
24 argument, as I understand it: They are saying that as of
25 the end of our Warn Act hours, we had more than 83 and a

1 third hours, which is what they need under the plan
2 supplement to get one year of vesting service. Different
3 question.

4 They are saying, therefore, it's just like we
5 worked until the end of the year. That's not right. They
6 get a year of vesting service. What you have to do is go
7 look at 3.6 for credited service, and that has a very
8 complex formula which they -- and in that formula they have
9 to get over 500 hours to get into credit, and then there are
10 deductions. No matter how you play out credited service,
11 they can't get to July 20, 2003.

12 THE COURT: Is it, in a nutshell, your position,
13 at least, on behalf of the plan right now, that -- that the
14 operative date for termination insofar as taking a snapshot
15 as to when the Plaintiffs -- as to what multiplier the
16 Plaintiff is entitled to, is -- would it be the date they
17 received their last paycheck?

18 MR. LANZILLO: I wouldn't characterize it that
19 way. I mean, the way --

20 THE COURT: Or is it the last date they walked out
21 of the building? Or what is it?

22 MR. LANZILLO: No later than March 16, 2002,
23 because -- and I'm extrapolating from the Warn Act. I mean,
24 you can have two scenarios in the Warn Act, as the Court is
25 well aware. You can either give them 60-days' notice and

1 then end it there, or you can, in lieu of notice, pay them
2 the last 60 days.

3 THE COURT: But however you look at it, it is at
4 that point in which the employer/employee relationship
5 terminates. Is that right?

6 MR. LANZILLO: Correct. I think that's a fair
7 characterization, Judge. And that is when all the rights
8 are fixed. Now, you may go back and do calculations, you
9 may look at giving them extra hours to get them to the hours
10 they need to get that last year of service to qualify for a
11 pension, but things terminate. Their vesting service --
12 they can have no vesting service after that date, even
13 though they might be credited or might not be credited with
14 additional hours.

15 THE COURT: Now, this may be neither here nor
16 there, but you weren't involved in this collective
17 bargaining settlement. I presume Mr. Perhacs was.

18 MR. LANZILLO: That's correct.

19 THE COURT: All right. Do you know anecdotally
20 from Mr. Perhacs or from some other source whether folks
21 like these Plaintiffs became -- were considered or talked
22 about in connection with this ultimate resolution?

23 MR. LANZILLO: I don't, Your Honor. It ceased to
24 be a collective bargaining grievance issue, went into
25 litigation, got kicked down to me. I looked at that

1 Settlement Agreement --

2 THE COURT: I'm not even sure what it means.

3 MR. LANZILLO: Well, you know, it uses a phrase --
4 it uses the word "retires" during a certain period of time,
5 which is --

6 THE COURT: First of all, it looks like somebody
7 drafted it longhand.

8 MR. LANZILLO: Yeah.

9 THE COURT: I mean, I --

10 MR. LANZILLO: I don't know.

11 THE COURT: I don't know. I'm just trying to get
12 some insight. All right. Let me hear from -- all right.

13 How do you grow into the -- if the plant
14 closed on January 16th, 2002, how did your people acquire
15 sufficient service, vesting benefit service, to take them,
16 by your lights, at least to the end of 2002, and by my
17 calculations, under the best case scenario, it could take
18 them out five years, or something like that. Right?

19 MR. METTLEY: I don't know about five years, but
20 certainly for 2002.

21 THE COURT: Well into 2003 or beyond. Tell me the
22 three -- let's talk about the individual ways.

23 Now, they get 83 1/3 hours of service -- if
24 they had 83 1/3 hours of service in any year, do I
25 understand that they -- by your lights, they receive vesting

1 credit for that year?

2 MR. METTLEY: Absolutely.

3 THE COURT: All right. So would it be your --
4 your point, then, is that one year of vesting service, as
5 you interpret that, would take them through 2002 and get
6 them to the \$31 multiplier.

7 MR. METTLEY: I think if you look at the
8 supplement, it defines the relevant provision regarding
9 vesting service. It says that an employee shall receive
10 credit for a year of vesting service for each calendar year
11 in which he has at least 83 1/3 hours of service.

12 Our argument is, is under any one of three
13 different ways of looking at it, they receive 83 -- or
14 should have received 83 1/3 hours of service for 2002.
15 Therefore, they get a year of vesting service for 2002.

16 How you can then say that their vesting
17 service actually terminated during that year, I do not see
18 support for in the plan. I do not see that the plan
19 ascribes any particular relevance to the termination of the
20 employment relationship or layoff.

21 THE COURT: Now, you say they get one hour of
22 vested -- and this is how you get your time. You say they
23 get one hour of vesting service for each hour of involuntary
24 layoff. Is that right?

25 MR. METTLEY: That's correct.

1 THE COURT: Well, my goodness gracious. I mean,
2 in an esoteric sense, they will be on involuntary layoff
3 until the day they die. When did you stop computing those
4 hours?

5 MR. METTLEY: Well, Your Honor, in the supplement
6 it defines that provision of the hours of service. And,
7 first of all, it defines the hours of service the same way
8 for credited service and vesting service. Of course, we're
9 taking about vesting service. On Page 2 of the supplemental
10 plan, it defines hours of service or modifies the
11 definition, and it says not more than 36 months of
12 involuntary layoff. So I think that that provision would
13 certainly grant Plaintiffs a clear claim for three years of
14 vesting service.

15 THE COURT: And the -- I think that's where I got
16 the three years. I thought it was a little high, but -- and
17 then the Warn Act, basically your position is they would be
18 entitled to at least 480 hours of service, which is
19 obviously more than the 83 1/3 necessary to get you to --
20 that might have been where I came up with the number of
21 years. That takes you out sufficiently; a significant
22 period of time.

23 In your brief at Page 9.

24 MR. METTLEY: Yes, Your Honor.

25 THE COURT: For the record it says, "Donachy and

1 Kinley are entitled to a deferred vested retirement benefit
2 that is," quote, "computed in the same manner as a normal
3 retirement benefit," close quote, "based," quote, "on the
4 benefit rate and his credited service as of the date his
5 vesting service terminates," close quote. In other words,
6 the applicable benefit multiplier is the same as for a
7 normal retirement benefit, but based on the date Donachy and
8 Kinley's vesting service terminates.

9 Then you go on to say, "The parties agree on
10 the analysis to this point. Motion Control and the
11 retirement plan argue, however, that an employee's vesting
12 service necessarily terminates when his employment is
13 terminated."

14 So I'm clear here, once again -- and I'm
15 going over ground that has been, I think, more than
16 adequately tilled. All your entitlement eggs are placed in
17 the deferred vested benefit basket. Isn't that right?

18 MR. METTLEY: That's how it was phrased in our
19 brief. If you're asking me the question, Your Honor, I
20 don't think that all those eggs lie in that basket.

21 THE COURT: Whose brief is it?

22 MR. METTLEY: No, it's my brief, Your Honor,
23 clearly, but I can't see --

24 THE COURT: I'm not saying you can't have an
25 epiphany, because many times I have written things and

1 thought to myself, you know, maybe that isn't exactly what I
2 meant to say.

3 MR. METTLEY: The reason -- I'm not backing away
4 from what I wrote in the brief. I'm just saying that I
5 don't see that Donachy and Kinley's -- all their eggs are
6 necessarily in that basket. The question is, do they get
7 the \$31 benefit multiplier. I think there are a lot of
8 different ways to skin a cat.

9 THE COURT: To stick with my metaphor, what other
10 basket besides the deferred vested benefit basket could hold
11 those eggs? Could they ever be classified as normal
12 retirees?

13 MR. METTLEY: Possibly.

14 THE COURT: How.

15 MR. METTLEY: By reaching age 65 and applying for
16 benefit at that point in time.

17 THE COURT: But that -- in all respect, that is
18 facially inconsistent with those provisions that we just
19 talked about a little bit earlier, isn't it? Every now and
20 then you have got to put your sword down and agree on a
21 point. I'm not saying you have to. But doesn't it appear
22 that way, at least?

23 MR. METTLEY: For the sake of argument, let's say
24 I agree with that. At the end of the day, they are still
25 going to be calculated based upon the credit service and

1 some pension benefit multiplier.

2 THE COURT: I'm not sure -- in broad brush, that's
3 probably true. But it's not just a question of differences
4 around the fine edges. For purposes of the resolution of
5 this position, it is critically important, is it not,
6 whether or not they are treated as normal retirees or
7 deferred vested benefit retirees?

8 MR. METTLEY: I would --

9 THE COURT: Because the analysis is completely
10 different. Completely different.

11 MR. METTLEY: I don't think that it's completely
12 different.

13 THE COURT: It's materially different.

14 MR. METTLEY: I think it's somewhat different. I
15 don't know that it makes that much of a difference, Your
16 Honor, because I really do view this as simply how old are
17 they when they apply and how many years of service do they
18 have. And then we're going to compute the benefit. You can
19 call it --

20 THE COURT: But -- not to interrupt you, but clear
21 enough, this much is true: That it would not be necessary
22 to jump through all those analytical hoops that we've just
23 talked about as to how your vesting service might continue
24 to accrue through some form or fashion. It would not be
25 necessary to engage in that type of analysis if one was a

1 normal retiree. Isn't that correct?

2 MR. METTLEY: Yes, that probably would be the
3 case.

4 THE COURT: All right. Thank you.

5 (Discussion held off the record.)

6 THE COURT: I'm going to get something out on
7 this. I have no fixed opinion, but I have got to say, if it
8 should come to pass -- and I say if I conclude that it's not
9 appropriate for me to reach the merits, but it's appropriate
10 that this matter be dismissed without prejudice, given the
11 amount of time -- what is this, an '04 case? Well, it's
12 getting older. It would -- if I go that way, it would be
13 with an intention to -- with a direction to the plan to act
14 expeditiously on this, so -- if I do. But that's an if. I
15 don't know what I have to do. We'll get something out.

16 MR. LANZILLO: Your Honor, may I ask a question.
17 This may be important. If the Court were to go in that
18 direction, how the question is phrased is critically
19 important to us. And the way the plan is structured, if the
20 initial burden is on the Plaintiffs to tell us, you know,
21 what they are looking for -- because the analysis would
22 change dramatically depending on the benefit. And to make a
23 threshold presentation of the basis for that claim, if I
24 could --

25 THE COURT: Well, what you're asking for me to do,

1 if I go that way -- and this is going to bring me to another
2 point. I'm glad you're raising this. Is to direct the
3 Plaintiffs to, if you will, submit a clear declaration
4 question to the plan. Is that right?

5 MR. LANZILLO: Yes, Your Honor. Including the
6 nature of the benefits they are looking for and when they
7 were proposed to have their benefits commence. That's
8 another factor.

9 If they are looking to start prior to age 65
10 or some scenario where that can occur, well, the whole
11 calculation changes. So -- and not to preempt my opposing
12 counsel. The critical things we would need to know would
13 be, number one, what type of benefit do you contend you're
14 entitled to. And I understand now that would be deferred
15 vested retirement; not early, not normal. When would you
16 propose to commence the receipt of benefits for each
17 Plaintiff; at age -- presumably at age 65. And then any
18 additional information as far as your position on years of
19 credited service, hours, and birth date information. We
20 could dig that out, but it would be helpful to have that in
21 the declaration.

22 THE COURT: Let's go off the record.

23 (Discussion held off the record.)

24 MR. METTLEY: The problem, Your Honor, is that
25 beyond Mr. Donachy and Mr. Kinley are the remaining unspoken

1 Plaintiffs, who are similarly situated.

2 THE COURT: Thank you. That's a good point. We
3 have this punitive class standing behind these folks here as
4 well.

5 MR. METTLEY: We could resolve Mr. Kinley and
6 Mr. Donachy, but that would not necessarily resolve the
7 Defendants' problems, because at some point later on down
8 the line, some other individual who participated in the plan
9 may decide that they want to apply for a benefit, and you
10 know what, they think they are entitled to a \$31 multiplier
11 too.

12 THE COURT: Well, this is just thinking off the
13 top of my head, but it would strike me that to the extent
14 that the punitive class members are sufficiently similarly
15 situated to be an appropriate class under Rule 23, the
16 decision as to one class representative would essentially be
17 the decision as to all, wouldn't it? If they were in the
18 same shoes, pretty much.

19 MR. METTLEY: Yeah, I would agree with that.

20 THE COURT: But you're saying there's other folks
21 out there who may not be entirely similarly situated, and
22 they have different arguments to make?

23 MR. METTLEY: Well, there is another set of
24 litigation involving this Plaintiff. So, yes, I know that
25 to be true.

1 THE COURT: All right. Isn't that just a
2 situation where I cross that bridge when I get to it?

3 MR. METTLEY: Perhaps. Another problem I see with
4 Mr. Lanzillo's proposition about our clients having to set
5 forth all these particulars, that's requiring them to do
6 something that ERISA says they don't have to do. ERISA says
7 a plan participant has the right to get a clarification as
8 to their rights under the plan. They don't need to file a
9 claim. They have the right to say, hey, when I retire, be
10 it at age 50, at age 65, whenever that may be, I want to
11 know what multiplier I'm entitled to. I don't understand
12 why Mr. Kinley or Mr. Donachy would have to say today, I'm
13 going to retire on such-and-such a date in the future.

14 THE COURT: Well, without getting too far into
15 niceties, I think in broad brush, the rule is that there at
16 least has to be a meeting of the minds or the issue has to
17 be sufficiently broadly joined so that the plan understands
18 in broad brush the basis upon which the applicant is seeking
19 a declaration or benefits.

20 It strikes me in this particular case,
21 though, Mr. Lanzillo, if it were to come to it going back to
22 the plan, I don't see the point of requiring the Plaintiffs
23 to do any more work than they have already done in their
24 brief. It seems to me -- doesn't your brief, Mr. Mettley,
25 where it spells out their entitlement to the \$31 multiplier

1 under the deferred vested benefit theory, doesn't that tell
2 the plan everything that it ever wanted to know, pretty
3 much?

4 MR. METTLEY: It does.

5 THE COURT: Well, that would be it.

6 MR. LANZILLO: All right, Your Honor, as the
7 question was just phrased by Mr. Mettley, it's impossible to
8 answer the question. Now, I will -- and I understand --

9 THE COURT: Impossible to answer what question?

10 MR. LANZILLO: This idea that we should try to
11 answer all of the hypotheticals --

12 THE COURT: We don't have to. Because if it comes
13 to that, you have a perfectly sketched-out position in the
14 Plaintiffs' brief. What more -- in fact, it is probably
15 with more exquisite detail than is even required under
16 ERISA. Isn't that right?

17 MR. LANZILLO: I would not necessarily -- I would
18 not agree with that.

19 THE COURT: Is the brief adequate --
20 hypothetically, is the brief adequate for the plan to
21 address it?

22 MR. LANZILLO: I believe it is. The only thing
23 that's not there is timing matters. If I understand their
24 position in their brief, they want to know what the
25 multiplier would be as of normal retirement age, age 65,

1 calculating a deferred vested retirement benefit.

2 I'm not trying to be difficult, Your Honor.
3 I just -- it matters in the calculation. If they want to
4 take that benefit early, there's certain mechanisms that
5 allow them to do that. For purposes of this -- this is all
6 hypothetical, because you're --

7 THE COURT: I haven't made any ruling.

8 MR. LANZILLO: But Your Honor pointed out on the
9 issue of -- they are not there yet. They are not asking --
10 they are not applying for benefits. So they have to give us
11 a hypothetical that is capable of response.

12 THE COURT: Well, what would that be?

13 MR. LANZILLO: As I --

14 THE COURT: No, I'm asking Mr. Mettley. What is
15 it?

16 MR. METTLEY: I'm not sure I understand.

17 THE COURT: I'm not sure I do either.

18 MR. METTLEY: The monthly benefit, regardless of
19 the form of benefit -- and this was the point I was probably
20 not adequately conveying -- is the same.

21 MR. LANZILLO: That's wrong. That's the problem.

22 MR. METTLEY: It's years of service times the
23 multiplier. And if it's an early retirement benefit or a
24 deferred, then you actuarially reduce it from the normal.

25 THE COURT: Well, the mere fact you disagree with

1 the predicate, so what. That happens all the time. At
2 least you know what he's looking for.

3 MR. METTLEY: They just want to know if they are
4 entitled to the \$31 multiplier.

5 THE COURT: But he's entitled to know on what --
6 you have to hang your \$31 multiplier up on some plan hook.
7 I mean, otherwise, I don't know how they can address it.
8 And you already have, in my view --

9 MR. METTLEY: We have picked the hardest way.

10 THE COURT: You have picked the deferred vested
11 benefit hook.

12 MR. LANZILLO: Your Honor, here's what I'll do:
13 Because I don't want to be difficult or protract this. If
14 the committee gets to a point where they would think that
15 there is unanswered information that is necessary in order
16 to come to a decision, I'll identify that by counsel. Or in
17 our response, I'll have them articulate an assumption
18 that -- on this particular issue, we are assuming, you know,
19 a retirement benefit commencing on each Plaintiff's 65th
20 birthday. If that becomes necessary.

21 THE COURT: All right. Well, I'm going to get an
22 Order out on this one way or the other, hopefully with some
23 dispatch. If it -- if I retain it goes to the merits, it's
24 going to be longer. If it's resolved on the exhaustion
25 issue, obviously, it's going to be somewhat shorter.

1 But in any event, even if I resolve it there,
2 I expect to see this back again in rather short trip.

3 All right, thank you.

4
5 (Hearing concluded at 2:27 p.m.)
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25